

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROY H. SMYER and U.S. POSTAL SERVICE,
POST OFFICE, Los Angeles, Calif.

*Docket No. 97-2036; Submitted on the Record;
Issued June 28, 1999*

DECISION and ORDER

Before WILLIE T.C. THOMAS, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs abused its discretion in refusing to reopen appellant's case for merit review under 5 U.S.C. § 8128(a) on the grounds that appellant's May 16, 1996 request for reconsideration was untimely filed and failed to present clear evidence of error.

The Board has duly reviewed the case record in this appeal and finds that the Office did not abuse its discretion in refusing to reopen appellant's case for merit review under 5 U.S.C. § 8128(a) on the grounds that appellant's May 16, 1996 request for reconsideration was untimely filed and failed to present clear evidence of error.

On June 7, 1974 appellant, then a clerk, filed a traumatic injury claim (Form CA-1) alleging that on that date he injured his neck, chest and back while picking up a card that fell under a moving belt.

The Office accepted appellant's claim for low back strain.

By decision dated April 17, 1984, the Office terminated appellant's compensation effective May 16, 1984 on the grounds that the evidence of record was insufficient to establish that he had any continuing disability causally related to the June 7, 1974 employment injury. In a May 15, 1984 letter, appellant requested an oral hearing before an Office representative.

By decision dated June 6, 1985, the hearing representative affirmed the Office's decision. On September 23, 1985 appellant, through his representative, appealed the hearing representative's decision to the Board.

In a January 31, 1986 decision, the Board affirmed the hearing representative's decision. In a November 13, 1986 letter, appellant requested reconsideration of the Office's decision.

By decision dated February 18, 1987, the Office denied appellant's request for reconsideration without a review of the merits on the grounds that the evidence submitted was repetitious in nature and thus insufficient to warrant review of its prior decision.

In a February 8, 1989 letter, appellant requested reconsideration of the Office's decision. By decision dated June 23, 1989, the Office denied appellant's request for reconsideration without a review of the merits on the grounds that appellant failed to submit any new medical evidence which warranted review of its prior decision.

By letter dated May 31, 1990, appellant requested reconsideration of the Office's decision. By decision dated August 8, 1990, the Office denied appellant's request for reconsideration without a merit review of the claim on the grounds that the evidence submitted was cumulative and repetitious in nature and thus insufficient to warrant modification of its prior decision.

In an August 5, 1991 letter, appellant requested reconsideration of the Office's decision. By decision dated November 27, 1991, the Office denied appellant's request for reconsideration without a review of the merits on the grounds that the evidence submitted was repetitious in nature and thus insufficient to warrant review of the merits of its prior decision.

In a December 17, 1993 letter, appellant requested reconsideration of the Office's decision. By decision dated January 3, 1994, the Office again denied appellant's request for reconsideration on the grounds that it was untimely filed and that it did not establish clear evidence of error.

By letter dated May 1, 1995, appellant requested reconsideration of the Office's decision. By decision dated June 15, 1995, the Office denied appellant's request for reconsideration on the grounds that it was untimely filed and that it failed to present clear evidence of error.

In a May 14, 1996 letter, appellant requested reconsideration of the Office's decision. By decision dated May 31, 1996, the Office again denied appellant's request for reconsideration as untimely filed and that it failed to present clear evidence of error.

The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.¹ Inasmuch as appellant filed his appeal with the Board on May 29, 1997, the only decision properly before the Board is the Office's May 31, 1996 decision denying appellant's request for a review of the merits of the June 6, 1985 hearing representative's decision.²

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,³ a claimant must: (1) show that the Office erroneously

¹ 20 C.F.R. §§ 501.2(c), 501.3(d)(2); *Oel Noel Lovell*, 42 ECAB 537 (1991).

² In its May 31, 1996 decision, the Office indicated that its August 8, 1990 decision was the last merit decision in this case.

³ 5 U.S.C. §§ 8101-8193.

applied or interpreted a point of law; (2) advance a point of law or a fact not previously considered by the Office; or (3) submit relevant and pertinent evidence not previously considered by the Office.⁴ To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.⁵ When a claimant fails to meet one of the above standards, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under section 8128(a) of the Act.⁶

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of the Act. The Office will not review a decision denying or terminating a benefit unless the application for review is filed within one year of the date of that decision.⁷ The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a).⁸

In this case, the Office properly determined that appellant failed to file a timely application for review. In implementing the one-year time limitation, the Office's procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original Office decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues.⁹ The Office issued its last merit decision in this case on June 6, 1985 wherein a hearing representative affirmed the April 17, 1984 decision terminating appellant's compensation effective May 16, 1984 on the grounds that the evidence of record was insufficient to establish that he had any continuing disability causally related to the June 7, 1974 employment injury. Inasmuch as appellant's May 14, 1996 request for reconsideration was made outside the one-year time limitation, the Board finds that it was untimely filed.

In those cases where a request for reconsideration is not timely filed, the Board has held, however, that the Office must nevertheless undertake a limited review of the case to determine whether there is clear evidence of error pursuant to the untimely request.¹⁰ Office procedures state that the Office will reopen a claimant's case for merit review, notwithstanding the one-year

⁴ 20 C.F.R. § 10.138(b)(1)-(2); *Thankamma Mathews*, 44 ECAB 788 (1993).

⁵ 20 C.F.R. § 10.138(b)(2).

⁶ *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

⁷ 20 C.F.R. § 10.138(b)(2); *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

⁸ *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

⁹ *Larry L. Lilton*, 44 ECAB 243 (1992).

¹⁰ *Gregory Griffin*, *supra* note 7.

filing limitation set forth in 20 C.F.R. § 10.138(b)(2), if the claimant's application for review shows "clear evidence of error" on the part of the Office.¹¹

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.¹² The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.¹³ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹⁴ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁵

In support of his May 14, 1996 request for reconsideration, appellant merely resubmitted correspondence between himself, the employing establishment, the Office and the Office of Personnel Management and medical evidence. This evidence was previously considered by the Office. Appellant also submitted a February 27, 1996 medical report, of Dr. Michael P. Acord, a physiatrist, revealing that appellant's back problems had been present from at least 1974 through the present. Dr. Acord stated that there was a combination of a herniated nucleus pulposus at L4-5 combined with bone spur formation resulting in a spinal stenosis and appellant's current condition. Dr. Acord failed to provide any medical rationale for the relationship between appellant's current back problems and the June 6, 1974 employment injury. Thus, this report does not raise a substantial question as to the correctness of the Office's June 6, 1985 merit decision and the Office's refusal to reopen the case on its merits was proper.

Inasmuch as the evidence submitted by appellant in support of his request for reconsideration does not manifest on its face that the Office committed error in the May 31, 1996 decision, the Office did not abuse its discretion by refusing to reopen appellant's case for merit review under section 8128(a) of the Act on the grounds that his application for review was not timely filed and failed to present clear evidence of error.

¹¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsideration*, Chapter 2.1602, para. 3b (January 1990) (the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.138(b)(2), if the claimant's application for review shows "clear evidence of error" on the part of the Office); *Thankamma Mathews*, *supra* note 4; *Jesus D. Sanchez*, *supra* note 8.

¹² *Dean D. Beets*, 43 ECAB 1153 (1992).

¹³ *Leona N. Travis*, 43 ECAB 227 (1991).

¹⁴ *Jesus D. Sanchez*, *supra* note 8.

¹⁵ *Leona N. Travis*, *supra* note 13.

The May 31, 1996 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, D.C.
June 28, 1999

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member